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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 932

GIBSON STEWART COMPANY, INC.,

Petitioner,

v.

WM. BROS. BOILER AND MANUFACTURING COMPANY, Now by Change of Name BROS. INCORPORATED,

Respondent.

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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Aside from considering whether respondent does more than "protest too much" in its brief opposing the Petition for Writ of Certiorari herein, there are believed to be several aspects of respondent's brief that should be noted in particular.

First, contrary to respondent's contention, it is submitted to be clearly established beyond question that this Court would have every warrant for noticing the published article included by petitioner in its Appendix (App. p. 35) if the Court agrees that this article is helpful, as petitioner believes it is, in providing a detached and unbiased explanation of the background and significance of the alleged invention here. See *Work* v. *Parker*, 249 U.S. 130 (1919), affirming 231 F. 121 (3rd Cir. 1916).

Second, in attacking the published article submitted in petitioner's Appendix (App. p. 35) for consideration by the Court, respondent's brief not only goes beyond, but actually contradicts, the record below in contending (p. 6) "that the government 'specifications' mentioned therein . . . were in fact written *after* the invention of the patent in suit had been made." The pertinent portion of the certified record is as follows (Appellee's Appendix pp. 8b to 10b):

TESTIMONY OF ARCHIE O. WILLIAMSON*

. . . . . .

Q. Now, will you just briefly state what the events were that led up to the taking of the moving picture I am about to ask you to describe to the Court?

A. The moving picture you are about to see is the picture taken of our initial machine and it is at Binghampton, New York, through a swamp area in which an expressway was to be built by the State of New York. . . . [T]he New York State Highway Department felt that probably here was a good opportunity to find out how well this heavy type pneumatic compactor would perform, and it was sent down there through the summer or late summer of 1949 and performed very successfully.

Q. Now, do we understand this is the first machine of this type that was used?

A. This was the No. 1 machine, yes.

. . . . . .

* One of the persons named as an inventor on the patent in suit, and respondent's sole witness below.

Q.

Now, with reference to the film you are about to explain, tell us who took the picture and under what conditions it was made.

A. Well, we had the picture taken due to the fact it was our first machine and we wanted to know how it performed, and at the same time we needed it as a visual record for our Engineering Department, and, selfishly, initially for our Sales Department, in future sale of the equipment.

It seems at least passing strange that no mention was made during this testimony, or elsewhere in the record below, of respondent's previous successful bid in response to the government specifications in the spring of 1949 (App. p. 35), and of which petitioner learned for the first time during the preparation of the Petition herein.

Third, respondent's brief (pp. 2 and 3) contends that petitioner has not described respondent's cart-like earth compacting roller complexly enough, and notes specifically that petitioner's description has failed to assign proper importance to "a draft beam" referred to in claim 1 of the patent in suit. Petitioner is content to let common knowledge indicate whether it is particularly notable or any sign of complexity that a cart-like structure incorporates "a draft beam," and petitioner further respectfully requests the Court to consider whether, in view of this contention by respondent, there is any substance to the bald suggestion in respondent's brief (p. 3) that a "real understanding" of the patented structure "can be obtained only by referring to all four claims of the patent itself."

Finally, the Court may wish to note that respondent's brief nowhere mentions the third Question Presented by the

Petition herein, or in any way takes issue with the related Argument III by petitioner as to the error below in treating the issue of validity on appeal as if it were a finding of fact. As respondent's brief appears studiously to avoid this issue, it in turn appears that respondent is not prepared to contest petitioner's position that the treatment of the issue of validity by the Court of Appeals as a finding of fact was contrary to the rule announced by this Court in *Great A. & P. Tea Co.* v. *Supermarket Equipment Corp.*, 340 U.S. 147 (1950).

GIBSON-STEWART COMPANY, INC.
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